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Tuori, Kaius Tapani

T & T Clark

2019

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Tuori, K T 2019 , Exiled Romanists between Traditions : Pringsheim, Schulz and Daube . in  
pö K Tuori & H Björklund (eds) , Roman Law and the Idea of Europe . Eur  
Modern World , T & T Clark , London , pp. 35-51 . <https://doi.org/10.5040/9781350058767.0009>

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<http://hdl.handle.net/10138/298592>

<https://doi.org/10.5040/9781350058767.0009>

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Tuori, Kaius. "Exiled Romanists between Traditions: Pringsheim, Schulz and Daube." *Roman Law and the Idea of Europe*. By Kaius Tuori and Heta Björklund. London: Bloomsbury Academic, 2019. 35–52. *Bloomsbury Collections*. Web. 1 Feb. 2019. <<http://dx.doi.org/10.5040/9781350058767.0009>>.

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# Exiled Romanists between Traditions: Pringsheim, Schulz and Daube

Kaius Tuori<sup>1</sup>

## Introduction

The purpose of this chapter is to investigate the way Romanists exiled by the Nazis reacted and adapted to new scholarly traditions in their writings. Though ancient Rome and Roman law remained their primary focus, for scholars in exile, the changing of circumstances often meant that they would need to take into account the different approaches, focuses of attention and methodologies popular in their adopted countries. In Britain, they were also faced with a new kind of political culture and ideals, many of which appeared strange while others, such as liberalism and individualism, were seen as welcome contrasts to the German tradition taken over and corrupted by the Nazis.

The transformation of scholarship due to exile is a phenomenon that has been recorded in numerous studies on exiled scholars.<sup>2</sup> In many cases, there was little or no change. The theoretical physics done by Einstein at Princeton was perhaps not substantively different from the work he had done as a director of the Kaiser Wilhelm Institute of Physics in Germany. In a similar way, the art historians recruited to the United States were perhaps not prompted to change the content of the work they had been doing. For the most extreme example of how the experiences of deprivation, persecution and exile affected scholarship, one may look at political scientists such as Franz Neumann (who was originally a jurist) or Hannah Arendt (who wrote at length about totalitarianism and dictatorship). For lawyers in general, transitioning to a new environment was especially hard because the black letter law tends to be so national, making it almost impossible for a German lawyer to practice or teach in Britain or in the United States beyond a few disciplines.

In order to address the issue of exile and scientific change on Roman law scholars, I will focus on three scholars: Fritz Pringsheim, Fritz Schulz and David Daube. The reason for the choice is in part obvious, as they were the best known of the Roman law scholars who moved to Britain. They also provide a chance to observe important variations in political inclinations and age. With all of them, there is the added benefit that there are fairly recent biographies of each of them, allowing us to focus on the change in their scholarship.<sup>3</sup>

For the most part, investigating reactions to new surroundings would demand either a control group or a way of investigating what particular influences were received and why. However, no such luxury is available to us, because the numbers are quite small, and a control group not affected by the Nazi regime is not available, for obvious reasons.<sup>4</sup> In general, it has been observed that legal scholars going to exile in the United States, such as Hans Kelsen or Franz Neumann, tended to end up working in political science departments (Ash and Söllner 1996). Another common trajectory is that towards comparative law (a favourite among foreign scholars in US law schools even today). Some famous names, for example, Ernst Rabel, had, of course, made the transfer already much earlier. Then we have Hermann Kantorowicz, who began to collaborate with scholars in the United States and the UK earlier on, but died fairly early, making the tracing of a transformation even more difficult.

Age and linguistic skills were often a determining factor in acclimatization. The young could re-educate and gain necessary skills and contacts to make a new career, while the middle-aged and older often struggled. The ones who already knew English or had the capacity to learn languages had a clear advantage, but as with learning in general, age is a determinant here as well. In this case, Daube was the most likely to succeed, having both age and language skills, but both Schulz and Pringsheim were polyglots (as all Roman law scholars by necessity are), and, despite their age, able to learn. What is equally clear is that the conditions and cultural receptivity of the place of exile were of enormous importance. A settler society such as the United States was accustomed to people from diverse backgrounds and due to the enormous scale of earlier German immigration, had a ready social context into which the exiles could assimilate. While some countries were extremely homogenous and insular and thus difficult to come into, Britain was in the 1930s a society that was for all its insularity accustomed to exiles and people from different backgrounds. Despite this, the social isolation that many suffered was considerable. For Schulz and Pringsheim, Oxford was perhaps easier than some other places might have been, as they were in an environment where they still enjoyed some respect due their academic achievements and where knowledge of foreign languages was more common. With Daube, despite his Orthodox background, the effect of training in Britain eased his transition into British academic life.

Another way of observing change is that of looking at instances where a scholar picks up traits from the scholarly tradition of their adoptive countries. In Roman law, this is also not unproblematic. Can one say that there was a particularly British or American style of Roman law scholarship or a preoccupation peculiar to those areas (apart from the interest in *lex Aquilia*)? In the case of the move of some of the brightest minds of German Roman law scholarship to the UK, is this question equally one of their influence in Britain, the fact that their emigration brought forth a new generation of Roman law scholars in Britain, people such as Peter Stein, Tony Honoré, Alan Rodger or Alan Watson? As we will see, much of the change in approach was due to the fact that there was virtually no audience for the highly technical work they had done in Germany either in the UK or the United States. While many of the writings in exile can be grouped under the heading of 'advertisement for Roman law', as superficial texts intended to make the audience favourable to the subject, we will equally see how some of it was fascinating reinterpretation of matters to a new audience.

The aim of this inquiry is to observe changes in scholarship and scientific approaches with each of our examples, the way that they reoriented their scholarship in exile. As such, the results are inevitably contentious and tentative, as people are not simple receptacles of ideas or tendencies, and one must not reduce a scholarly change to changes in external circumstances. We struggle even to grasp what the experiences of persecution and exile meant for these scholars, let alone how it affected their work. Despite these challenges, I hope to be able to demonstrate some tentative suggestions on how the contrasting experience of Nazism and exile in Britain may have influenced them. As we will see, whatever changes are observable, they are essentially more nuanced than the works of political scientists who launched into an inquiry of the nature of the totalitarian state.

### Fritz Pringsheim: An officer in exile

The journey into exile was not easy for Fritz Pringsheim. A German patriot, an officer and a conservative, he was not known as an easy person to get along with. He was also over fifty when he left, a time when people rarely are at their most flexible and open to new ideas. This all meant that, on the face of it, Pringsheim's prognosis for adaptation to new surroundings was not promising. The fall from a high-status position in Germany to poverty combined with an unyielding mentality is rarely indicative of the flexibility and unprejudiced attitude that getting a new start normally requires.<sup>5</sup> But appearances can be deceptive.

Pringsheim's orientation towards Britain took place already in the early 1930s. Pringsheim's first recorded visit was a lecture tour in Oxford under the invitation of Francis de Zulueta in 1930, then three years later a stay with William Buckland in Cambridge. These visits also led to a series of publications in British journals such as the *Journal of Roman Studies*.<sup>6</sup> Thus while Pringsheim only moved into exile in 1939, in his scholarship the transfer appears much earlier.<sup>7</sup>

Pringsheim's aversion towards the totalitarian regimes, be they communist or national socialist was clearly evident already in his writings from the 1920s (of these in more detail, see Chapter 8 in this volume). There, he warned against the dangers of general principles and political aims, because when given too much weight they could be used to circumvent the law (Pringsheim 1930: 160–2). When the Nazis took power in 1933, Pringsheim criticized their legal policies early on in his lectures. He would go as far as writing an open letter to Carl Schmitt, at that point the main legal ideologue of the Nazi regime, about the role of Roman law in Germany. The Nazi policy had been to replace Roman law with Germanic people's law, but Pringsheim wrote that this was clearly wrong as Roman law was an organic part of the German legal tradition. Though openly challenged, Schmitt was unenthusiastic about the confrontation and no consequences resulted.<sup>8</sup>

The way that Pringsheim was treated in Germany got progressively worse during the 1930s. He was, early on, protected from dismissal (under the Nazi law for the Restoration of the Professional Civil Service on 7 April 1933) by his status as a *Frontkämpfer*. (During the First World War he had served as an officer on front-line

duty both on the Western and Eastern fronts.) This privilege was later abolished and in 1935 he was removed from his teaching duties as professor. Rather than dismissed outright, professors who were removed were often placed on different kinds of administrative leaves or moved to different universities where they were not given students or salaries. In the case of Pringsheim, in 1936 he was given a position in the research project at the Prussian Academy of Sciences working on an edition of the *Basilika*. The task was one that he had been interested in already when working with Ludwig Mitteis as a student (Honoré 2004: 6; Breunung and Walther 2012: 410). What this meant was that he no longer had the protection of his loyal students, because the Nazi policy was to remove all Jewish scholars from positions of teaching and influencing students.

One of the surprising effects of Nazi repression was the way that the impact of repressive measures rippled into the society at large as individuals and institutions began to anticipate the limitations and sanctions. Thus, even though publishing works by Jewish scholars was not prohibited, journals stopped taking them and removed Jews from positions of authority. As a result, Pringsheim's last publication in Germany was in 1934. The ban on Jewish authors was implemented through self-censorship and the implied threat of losing publishing subsidies that most scholarly publications in Germany relied on. In addition to not publishing works by Jewish scholars, they were not to be quoted except in a negative fashion.<sup>9</sup>

Possibly thinking that his social and professional standing would protect him from harm, Pringsheim would not go into exile until the last minute. Even then, the deprivations of being taken to a Nazi concentration camp in Germany was repeated in a sense when he was also arrested and taken to a prison camp in the UK. After *Kristallnacht* on 9 November 1938, Pringsheim was arrested and put into a concentration camp. He was released three weeks later. However, his mother had died during the ordeal, just two days after *Kristallnacht*. Like many others, Pringsheim had searched for an academic job in Britain, but the opportunities were not good. The shock of incarceration meant that he would accept a less than satisfactory offer from Merton College in Oxford. Even Oxford proved to be hazardous. After being arrested for suspicious activities (listening to the radio with his sons), Pringsheim was interned on the Isle of Man (Honoré 2004: 15–16; Breunung and Walther 2012: 425).

In the case of Pringsheim, his work contained much that was potentially politically sensitive in the Third Reich, even though it is not that obvious. What could be political about Greek law of sale? For the most part, the change in scholarship from the *Basilika* to the Greek law of sale was prompted (as noted by Honoré) by the lack of materials available in Oxford. This is not to say that the topic was not political. In fact, what the research implied was that many of the principles that were dear to the German legal science were in fact the products of the hated post-classical Roman law.<sup>10</sup> This was a long-standing debate that had been exacerbated by the focus on interpolationism. For Nazi scholars and even many conservatives in academia, the very idea that the texts of Roman law as they were now known were not purely Roman but rather the product of Greek, Hellenistic or even Semitic scholars who had edited them was a matter of great importance and passion. For conservatives like Salvatore Riccobono, the idea of oriental origins laid doubt on the whole legitimacy of Roman law as the product of pure



**Figure 2** Public shaming of Jewish women in Linz, Austria, during the *Kristallnacht*, November 1938. Photo by Galerie Bilderwelt/Getty Images.

Roman spirit. For Nazis like Ernst Schönbauer, the oriental roots would have meant that the law would be racially impure (Riccobono 1925–6; Schönbauer 1939: 390–1).

One may also see an interesting counter-narrative to the Nazi ideas of law in some of Pringsheim's earlier texts. For example, in an article published in 1934, he would present Rome as an empire of peace, prosperity and law, where even the lowliest people are guaranteed their rights, and the rule of law would be safeguarded by an independent legal profession. Even those with limited rights such as slaves would be protected against abuse (Pringsheim 1934: 141–53). What Pringsheim did was to raise cosmopolitan Rome as an ideal, as a model of a society and its treatment of others. This painted a stark contrast towards the nascent legal policies of Nazi Germany, where rights were not universal but rather determined by racial and ethnic heritage. According to the Nazis, law was subordinate to political expediency in that the will of the Führer was the highest law (Lepsius 2003; Koontz 2003; Stolleis 1998). In 1934, the last vestiges of legalism had been removed from the acts of the Nazis; with the purge known as the night of the long knives in late June and early July, even the most ardent supporters had to contend with the fact that the party would not shy away from openly murdering its own supporters.

As Honoré writes in his biography, Pringsheim was not a good fit for British legal academia, but much of the blame was due to his personality, which appeared haughty and Prussian to the British. What is equally clear is how rooted in the German tradition his work remained, meaning that the intake of new ideas was fairly limited. The praise he gives to the Roman jurists and their method can be seen as a



reflection of the type of scholarly approaches to legal science that had been the style of German scholarship from the nineteenth century onwards.<sup>11</sup> He sought parallels between Roman and English law, appreciating the practical, problem-oriented nature of English jurisprudence. Fairly soon after the war, he started to return to Freiburg periodically, helping in the reestablishment of the university. At the same time, he cultivated students both in Oxford (the most famous of them Honoré himself) and in Freiburg. He would even help Franz Wieacker, who had become deeply involved in the Nazi movement, to be rehabilitated after the war.<sup>12</sup> Pringsheim's position became thus progressively stronger both in Britain and in Germany, enabling him to advocate a return to normality and the resumption of the study of classical Roman law.

The example of Pringsheim shows a distinct turn of scholarship, but less so in the attitudes towards politics and science at large. It is clear that Pringsheim as a lawyer was deeply committed to law and jurisprudence and saw the dangers of excessive political power to the law. This conviction only solidified during the Nazi years and in British exile. In his published works, British exile meant the loss of a specialist audience of Continental Romanists, with whom he had numerous combative exchanges on very specialized subjects, and forced him to address more fundamental issues. He had to publish pieces that were aimed at a general legal audience, perhaps in order to gain more support for himself and the subject of Roman law. However, despite his illustrious students at Oxford, Pringsheim remained a German nationalist, and his prime reference group was in Germany. Even the book he wrote in exile about vulgar law was published in Germany, not by Oxford University Press (Pringsheim 1950). He would take a forgiving stance towards the former Nazis, perhaps out of necessity, since they were so numerous and usually kept their positions in academia even after the war. Pringsheim's letters show that he considered return and taking an active part in the reorganization of the Freiburg University as a crucial part of his efforts to guide German students towards the ideas of justice, democracy, and rule of law and to prevent the resurgence of Nazism. Freiburg was after all in the French zone of occupation where the repressive and punitive measures were harsh and caused hostility.

### Fritz Schulz: From interpolationism to the freedom of law

Our second case is Fritz Schulz, who was roughly the same age as Pringsheim and left Germany two months after him. What is different between them is that while Pringsheim returned to his chair in Freiburg after the war, Schulz never did.

Schulz's story of emigration has recently been told in detail by Ernst, but we can recapitulate the most important points here. Schulz had been selected as a professor of Roman law in Berlin in 1931, two years before the Nazi takeover, after chairs in Freiburg, Kiel, Göttingen and Bonn. Pringsheim and Schulz may have already been considered to have peaked in their careers; Schulz was fifty-four years old when the Nazis came to power. Like Pringsheim, Schulz was not Jewish but of Jewish ancestry and thus a target of the racial laws. He was also a member of the DDP, or the Deutsche Demokratische Partei, one of the primary opposition parties before it was banned. Unlike Pringsheim, who was protected by his status as a front soldier, Schulz was early



on faced with the inquiries of the Nazi bureaucracy and the deprivations of status and wealth that went with this. The way that these things worked was that one was not simply dismissed, but various means of removal were used. For Schulz, he was first forcibly transferred to Frankfurt am Main in 1934, but not assigned any teaching, but finally he was given early retirement from Berlin in 1935. Finally, in 1936, he lost his right to teach in Berlin and later he lost his access to libraries. The persecution of Schulz was chiefly the work of Carl Schmitt and Karl Eckhard, a young legal historian. The Schulzes first sent their children to Britain and, following a short stint in Holland, left for Oxford with the help of his editor at OUP, Kenneth Sisam, and his former student F. A. Mann.<sup>13</sup>

As a scholar, Schulz's main work before the Nazis' taking of power was tied to the interpolationist school. He had worked for the great *Index interpolationum* project, which sought to trace the post-classical interpolations from the preserved texts of classical jurists. In the same vein, Schulz produced other works of textual interpretation, such as the Epitome of Ulpian or the Sabinus fragments.<sup>14</sup>

These works were mainly exercises of textual criticism, of removing the encrustations of post-classical authors from the works at hand and revealing the authentic texts. Interpolationary criticism has since fallen out of favour, mostly because the aim was thought to be unreachable. The reason for this was that the textual criticism of a single compilation such as the Code of Justinian was not a reliable method. The rejection of texts and their parts relied on various criteria, such as textual or substantive criticism. Among purely textual grounds were things such as grammatical structure and its dating or word selection and its likelihood at a given time. The substantive criticism was based on dogmatic issues, whether a rule was typical of classical law, and so forth. There is probably no need to delve deeper into the intricacies of interpolationary research and the considerable passions that were involved to fairly soundly pronounce that they were hardly considered to be of political significance.

What emerged, however, in Schulz's writings after 1933 is a completely different approach. He wrote three main works under distress or in exile: *Principles of Roman Law* (1934, English translation 1936), *History of Roman Legal Science* (1946), and *Classical Roman Law* (1951). These books are to a greater or lesser degree books with agendas.

In the *Principles*, Schulz outlined his understanding of the underlying principles of Roman law, such as the autonomy of law from politics or liberty. He depicted Roman law as a creature of the rule of law, maintaining that it was a non-political protector of individual freedom. Many of the principles that Schulz presented, such as humanity, freedom and trust, may be understood as liberal ideas against the principles of national socialist law, the way that law was subjected to national political aims. As a whole, the book may be seen as a defence of the position of Roman law in Western civilization and an attack on the Nazi doctrine that sought to displace it, a remarkable work in the light of the situation it was written in.

The *History of Roman Legal Science* was initially a chapter for a general book on the history of legal science, but the end product was a full-blown glorification of the Roman jurists. If the *Principles* was a book addressing the value of free legal discourse and the idea of freedom and justice against the Nazi oppression and the strategic use of

law, the *Legal Science* was another type of cross-cultural endeavour altogether. Its idea of jurisprudence as the science of law was purely of German origin, one of systematic *Rechtswissenschaft*. Yet, its execution and its spirit were quite British. His heroes are the 'creative geniuses and daring pioneers' (p. 99) of the Roman Republic. It sought to present the practical genius of Roman jurists that manifested itself in the *responsa* given to clients. A jurist would abstain from advocacy, a profession Schulz considered below the legal profession, nor would he 'suffer the noisome weed of rhetoric' (p. 55). The science of law gained its scientific credentials from Greek philosophy and its dialectic method. Another Greek import was that of individualism, the foundation of law on the 'basis of freedom and individualism' (p. 84) (Schulz 1946: 85, 112, 119). There is thus much of the same in Roman jurisprudence and British legal scholarship: the concentration on practical legal solutions, the abstention from grand theories, and the recusal from advocacy. Of course, this was by no means a sign that Schulz had conflated the Roman and British jurists. It is perhaps possible that working within the British system, he had simply elaborated on the points that appeared relevant for his audience there.

The third and final book (Schulz's main works are books) was *Classical Roman Law* (1951). In it, Schulz continued to deepen the thesis of classicism, humanism and liberalism as the great foundations of the Roman legal tradition. In all of the books, the great uniting factor is (beyond the continuing belief in interpolationary research) the separation between law and politics: of the harmfulness of needless legislative inputs and the interference of political power in the law.

Within the praise of the Roman legal achievement, there were still elements that may be understood through the background of Nazi racial laws, for example, his exaltation of the Roman law of marriage:

The classical law of marriage is an imposing, perhaps the most imposing, achievement of the Roman legal genius. For the first time in the history of civilization there appeared a purely humanistic law of marriage, viz. a law founded on a purely humanistic idea of marriage as being a free and freely dissoluble union of two equal partners for life. (Schulz 1951, 103)

Recent scholars have questioned the accuracy of Schulz's idealistic interpretation (Urbanik 2016: 483). While the Nazi legal machinery regulated marriage with the aim of the preservation of racial purity and the continuation of the race through procreation, Schulz's Roman marriage was its complete opposite, a radical alternative to not only the Nazi marriage laws that forbade marriage between unsuitable partners such as Jews and 'Aryans' but also the modern European laws that were founded on the legal oppression of women and the obstacles placed on divorce.

Schulz never returned to live in Germany, preferring to stay in Britain. Alongside Pringsheim, he had sought and gained British citizenship in 1947. His family had left Germany for good, many of his children ending up in the United States, and despite the continuing financial hardship the prospect of a permanent return was not enticing. He was offered teaching positions, honorary doctorates and other possibilities to come back to Germany, but he held on to a fairly tenuous position as a tutor in Oxford.

Despite this, Schulz's influence continues to be significant in German Roman law scholarship, mostly due to his single student, Werner Flume.

Like Pringsheim, Schulz was a thoroughly international scholar to begin with, and thus the issue of tradition and influence of exile remains elusive. In his Roman law scholarship, he remained very much tied to the German style of research, with strong links to Italy. However, what the move to Britain meant for him was the necessity of applying a more general approach in scholarship and stepping back from the interpolationist school that was losing steam at the time. Instead, he would turn to the ideas of legal science and the self-referentiality of jurisprudence. One should not underestimate his influence in Britain, especially on the ideals of freedom and science in law and legal scholarship. The change in Schulz's scholarship was forced by the exile experience, by the forced removal from his zone of comfort both scientifically and socially. In the end, Schulz reprocessed the learning he had into a new kind of synthesis, one that was again significant when brought back to Germany. (*Legal Science* was translated into German only in 1961.)

### David Daube: An outsider who thrived

Our two previous examples, Pringsheim and Schulz, were driven to exile at the height of their careers. They were widely known and respected scholars who were settled in their ways and universities. In contrast, our third example is that of David Daube, a man three decades the junior of Pringsheim and Schulz. For the development of Roman law scholarship in Britain, Daube was to be the most consequential. Born in 1909, Daube was exiled already in 1933 and made his career first in Britain and then in the United States, at UC Berkeley. The example of Daube is one of interest since he was one of the great success stories of the German diaspora. If one compares him with, say, Hans Julius Wolff, the difference is huge. Wolff (born in 1902) would go into exile in 1935 in Panama and work his way around the United States during the 1940s and early 1950s, in places such as Tennessee or Oklahoma but without having a great impact. Only on his return to Germany would he rise to the professorship and make a splendid career. In contrast, Daube would begin a new education in Cambridge and ultimately became the Regius professor of civil law at Oxford.<sup>15</sup>

Though Daube had had his basic training in Germany with some very good people such as Otto Lenel, Pringsheim and Wolfgang Kunkel, he did his doctorate at Cambridge under Buckland. In his biography, Rodger describes Daube as being the ideal age for an emigrant, able to have gained the rigorous training of German academia but young enough to be able to learn the English language properly and to adapt to the different style of scholarship (Rodger 2004: 234–5). His introduction had been Otto Lenel, his teacher at Freiburg, who had written in July 1933 to Jolowicz in London, while Pringsheim had written to Buckland at Cambridge and de Zulueta at Oxford. Ultimately, Daube moved to Cambridge in 1933, but continued to visit Germany. In 1938, with the help of Cambridge friends, he arranged the flight of his family from Germany to Britain.<sup>16</sup>

In the case of Daube, the change in scholarship due to the experience in exile is thus total – one of immersion and refashioning. Before exile, he had published just

a couple of articles, meaning that there was no real comparison of before and after. According to Carmichael, Daube would credit his success to the exile experience, that the itinerant life from Germany to Britain and the United States was a key reason for the extraordinary fecundity of his work (Carmichael 2004: 124).

Apart from age, another great difference between Daube and the two older professors, Pringsheim and Schulz, was one of social standing and religion. While Pringsheim and Schulz were prosperous and assimilated members of the *Bildungsbürgertum* and their families had converted to Christianity, Daube was an Orthodox Jew from financially precarious circumstances.<sup>17</sup> Even when he left Germany, Daube was an outsider.

Daube was a scholar of Roman law, but his other main area of interest was religious law, both Talmudic and New Testament. It would have naturally been impossible for him to continue his career in Germany during the Nazi period, given that while the regime had an adverse attitude towards Roman law, it was even less inclined to grant additional resources to the study of Jewish law. Beyond the fact that the regime was opposed in principle to the subjects that Daube was interested in, his scholarship did not have similar traces of content criticism as is detectable in Pringsheim and Schulz. What Daube, who was by most accounts an apolitical person uninterested in making a political point through scholarship, has are numerous references to the moral choices present in the Third Reich and the Second World War.

In his book *Appeasement or Resistance* (1987), Daube takes up several examples, for instance, the 'Sophie's choice' situation of the mayor of Strasbourg during the war. His sons had been arrested and due to be executed in retaliation for the actions of resistance fighters. The German commander offers him a chance to save one of his sons, but he is unable to choose and both are executed. Daube compares this to the games of tyrants in classical literature, who made fun out of placing people in impossibly cruel dilemmas. In another example, the protagonist is not unknown: Daube's own teacher Wolfgang Kunkel, one of the leading scholars of Roman legal history. Kunkel was a military judge on the Eastern Front in 1943, where he was presented with a case of two captains, where one had denounced (out of jealousy of the other gaining a promotion) the other for listening to Moscow Radio, a capital offence. Rather than sentencing the man to death, Kunkel managed to demonstrate via clever legal reasoning that the sentence did not apply (Daube 1987: 51-2, 76-7). Though Kunkel is the hero of this story, he is equally clearly shown as a part of the Nazi machinery of terror. These kinds of stories were completely absent from the writings of Pringsheim and Schulz, who would refer to the Nazi years only in an oblique fashion. This is perhaps due to the general trend of discussion; before the 1960s the Nazi years were not discussed so openly and after that only Daube was around to do so.

Daube would hesitate to judge those who had joined the Nazis and instead stressed the need to understand the circumstances in which these choices were made.<sup>18</sup> Like many Germans, he was critical of the Nuremberg trials and the conception of retroactive justice it embodied. He would make a distinction between those who had joined the regime or the party because of anti-Semitic conviction and those who were opportunists or just making ends meet. Of course, Carmichael met with Daube only when he was in his fifties and time had possibly mellowed his feelings. Nevertheless, issues of resistance to and collaboration with tyranny remained a constant theme in his writings (Daube 1965; Carmichael 2004: 53, 82-3).

Even in Britain, Daube did not feel completely safe. He too was interned on the Isle of Man in June 1940, an experience that he later described as horrifying because it would have made it possible for a defeated Britain to easily collaborate with the Nazis and hand over the Jews collected there. This later recollection shows how deeply the existential threat was felt even in Britain. Unlike Pringsheim, Daube was of military age, which could explain why he was treated more harshly. He would spend four months in the camps and was freed only after petitions from powerful friends.<sup>19</sup>

Like the older professors Pringsheim and Schulz, Daube was a bridge between the Continental and the British traditions of scholarship, but unlike them he would become fully acclimatized to the new surroundings. Daube's links to Germany endured during his career, and in his bibliography one sees continuously articles written in German for German journals. With his methods and approaches, Daube became considerably more Anglo-American, moving freely between law, classics and theology. While for the older generation, the events that took place during the Nazi years were a clear aberration and signified the destruction of the academic life they had grown accustomed to, for Daube, the permanent attachment to a scholarly environment was formed only in Britain. Due to his Orthodox background, Daube did not have a similar high status in Germany, and due to his younger age the drop in social standing and salary was much less than among his older peers.

## Making sense of the Nazi years

In the studies of exile scholarship, numerous theories have been presented about the way scholars adapt to new circumstances and how they change their approaches and form new theories on the basis of their experiences in exile. Some, such as Hannah Arendt, dedicated their entire careers to understanding the experience of the *Shoah*, leading to celebrated works like *The Origins of Totalitarianism* (1951), detailing the mass movement and its relation to social conditions and ideological elements like anti-Semitism. Others, for example, Franz Neumann, would tackle the totalitarian state in the *Behemoth* (1944). Beside these celebrated scholars and the very obvious way that they were forced to confront the Nazi ideas, the examples dealt with here show a similar tendency of engaging the ideological challenge presented by the Nazis.

The challenge of the Nazi order was nothing less than existential for people such as Pringsheim, Schulz and Daube. The Nazis not only wanted to exterminate them and their families but also disparaged and wanted to abolish their object of study: Roman law. The Nazis forced their colleagues to turn on them and stripped them of their status, livelihood and occupation. Their relatives were brutally murdered en masse. After the war, they were faced with the prospect of encountering the same people that had forced them out of the profession. The fact that they were able to do that is nothing short of extraordinary. In the case of most of the exiles who went to the United States, for example, Neumann and Arendt, a similar rapprochement never took place.

Both Pringsheim and Schulz would write in defence of what they considered to be the true law, the foundation of Western legal culture: Roman law. However, the Roman law in their writings becomes enmeshed with virtues and qualities that are more at

home with the modern rule of law or the values inherent in liberalism. Humanism, individualism, freedom and giving each their due were ideals that they saw to be inherent in the works of Roman jurists. Unlike Nazi jurisprudence, which emphasized the primacy of the national interest, the political will and racial destiny, their Roman law was oriented relentlessly towards justice.

For the exiles, reaching out to the history of law and to Roman law was not simply a matter of what they did naturally; the kind of search for meaning that they went through was quite out of character. Especially with Schulz, his earlier works had been focused on the purely technical analysis of textual transmission that had no greater significance, at least openly stated. They operated purely within the tradition. On the other hand, during the exile process and in exile, they were to a certain degree outside the tradition and the circle of communication that would have understood them. Thus, the tradition takes on a different role; it signifies the loss of culture that Germany and they personally have gone through. The legal tradition was broken; Nazi totalitarianism had not only taken over the law but also subdued the very people who were supposed to defend it, the lawyers. By reaching into the past, to the tradition beyond the Nazi menace, they were recreating the ideals of law.

In contrast, the work of Daube shows no sign of a similar need to work through the issues of law and justice, but distances itself from the whole German experience. The way they are presented is largely as examples of totalitarianism and perversions of justice, a negation that is in and of itself quite obvious. It is impossible to say whether the fear that had gripped Daube, even in Britain, about being turned over to the Nazis was something that haunted Pringsheim and Schulz, but it is not possible to say that they would have been too idealistic about Britain.

What all of them have in common is praise of the classics of Roman law, the uplifting of the Roman legal tradition and its value that was under attack. Much of the work they had published, especially some of the minor pieces by Schulz and Pringsheim, must have appeared as superficial and bland generalizations to their former peers in Germany. In the culture of Roman law scholars in Germany and Italy, there existed a widely shared understanding, rarely uttered beyond the festive speeches and ponderations of the crisis of Roman law, of the value and meaning of the study of Roman law. Within that shared understanding, scholars could concentrate on the technical work on the intricacies of legal dogmatics. Since a significant amount of the interest was highly technical and based on the relevance provided by the said legal rules in the interpretation of the German Civil Code or *Bürgerliches Gesetzbuch*, there was equally a tendency towards sterility, the separation of the law from the life. What made the writings of someone such as Schulz or Pringsheim so important was that they were able to convey not only the technical side but also the meaning of the study of Roman law in the big picture, the development of the Western legal tradition. Whether they appreciated the style that they had to adopt for writing to a new audience unaccustomed to the scholarly style, I would be highly sceptical. Nevertheless, it was enough to prompt their students to embark on a novel type of research in Roman law.

The very fact that the exiles would write about the matters of legal heritage that reflected their experiences of exile was a rarity. When discussing exile legal scholars, one often mentions persons like Bodenheimer or Neumann who would take up the

Nazi past and analyse it. In contrast, the vast majority never did openly discuss their painful experiences. This may be a similar phenomenon as that of the soldiers who never discussed their wartime experiences. A comparison of sorts is the case of the Jewish refugees who fled to the United States and were assigned teaching positions in historically black colleges in the South. In her remarkable history of these scholars, Gabrielle Edgcomb notes that of these dozens of people, none wrote a single line of what must have been a surreal experience moving from the persecution of Nazi Germany to a different kind of persecution in the Jim Crow South (Edgcomb 1993).

For our scholars, Schulz, Pringsheim and Daube, despite their tribulations, the movement to exile was one of privilege. They were at the apex of German academic life and would stay there beyond the Nazi period itself. When subjected to a new tradition, they did that in the comfort of Oxford, helped by innumerable friends who sought to aid them. Their contact with the British tradition was not unproblematic, and it is not sure that they really overcame their sense that the legal and academic culture they had left was superior to the one they encountered in exile. In a similar manner, the experience with liberalism and other ideological traits may have been one of gradual influence and where the actual implications became evident only back in Germany. However, the great change that took place, that of the transition to a new country, to take up a new language and to write for a new audience, was one of great success. Whatever traumas they had they kept to themselves, in a manner typical of men of their age.

## Conclusion

The issue of observing change in scholarship, the adoption of new ideas and perceptions is difficult in and of itself, but these difficulties are compounded by the fact that even the persons themselves were not aware of these changes. Many of the German scholars who ended up in Britain during the 1930s were people with a previous interest in British culture (if there may be said to exist such a thing) and a certain admiration towards Britain. Hermann Kantorowicz, one of the most famous of the Romanist emigrants, was a long-time anglophile, who admired British humanism and individualism (Ibbetson 2004: 276).

It is hard to estimate the impact that Britain, its strange ways and its liberal democracy, had on the exiles. It is evident that for them the British scientific world was very much lacking compared to the one that they had left behind in Germany. However, the same German scientific world had rejected them on grounds that they must have considered barbaric (not to mention the deprivations by the Nazis they endured). In Britain, they were helped by the peculiar British idealism. The British exile was, if nothing else, a mixed bag of traumatic experiences and human kindness.

The relationship with Britain and its influence on scholarship was thus mostly one of unintended consequences. Firstly, the need to explain things to a new audience forced all of them to open up their writing and to say out loud much that was considered self-evident in Germany. Secondly, the fact that they were speaking to a new audience meant that much had to be presented through a new vocabulary, in a language and terminology



that the new audience would understand. Thirdly, within this process of opening up, there was perhaps an unintentional way of dealing with the negation of law that Germany had turned into. Thus, the classicism and the rather preachy tone of some of the writings, the reference to a rule of law and rather anachronistic liberal political references can be seen not only as appealing to the audience but also as the working through of the trauma at home. This applied almost exclusively to Pringsheim and Schulz, as Daube would escape much the trauma of the exiles and the need to work through them.

## Notes

- 1 This research has made been possible by the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n°313100 (Reinventing the Foundations of European Legal Culture 1934–1964).
- 2 Fermi 1968; Ash and Söllner 1996; Rösch 2014. On exiled lawyers, see also Graham 2002: 777; Lutter, Stiefel and Hoeflich 1993; Breunung and Walther 2012; Breunung and Walther, forthcoming.
- 3 In the case of Schulz, the main work is still Ernst 2004, but future work by Jacob Giltaij will shed new light on his career. Pringsheim has been studied by Honoré (2004), while Daube is covered by Rodger 2004 and Carmichael 2004. While these studies all have their deficiencies, they all discuss at length the exile experience. What they do not discuss, however, is the impact of that exile on their scholarship.
- 4 While there were Jewish legal scholars of German background in the United States, they were also greatly affected by the Nazi takeover due to what happened to their friends and relatives in Germany.
- 5 Issues of temperament are notoriously hard to verify; thus we are here reliant on Honoré's statement. Similar statements do pop up regularly, even late in his stay in Britain. Oxford University Press Archives, Oxford, Schulz CP GE 000345, 23, Warden of Merton College to Sisam (13.1.1944) about Pringsheim, who has 'prickly sensitiveness about his own resultant position'. He states that 'I think the College has treated him very handsomely, and am surprised that he shouldn't recognize it', concluding that he is a 'very difficult case'.
- 6 Breunung and Walther 2012: 409. There were two articles in the *JRS* in 1933, one in *Law Quarterly Review* in 1933 and one in *Cambridge Law Journal* in 1935.
- 7 Pringsheim's main works are collected in *Gesammelte Abhandlungen*, showing his combative and assertive style of scholarly debate.
- 8 Paragraph 19 of the NSDAP party programme from 24 February 1920: 'We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.' The debate between Pringsheim and Schmitt is now reproduced in Pringsheim 1960: 532–8. On Schmitt's position, see Mehring 2009; Cumin 2005; Balakrishnan 2000; Koenen 1995.
- 9 This is based on the works in the *Gesammelte Werke*. On the practical effects of the ban on publishing, see the article by Finkenauer and Herrmann 2017 which traces the references in the *Savigny Zeitschrift* and the downturn in the citations of Jewish authors.
- 10 Pringsheim's *Greek Law of Sale* (1950), his main occupation during the war, was ultimately published in East Germany. There is no indication in the archives on why this happened, because the book had been prepared for OUP.

- 11 Pringsheim 1944: 62: 'Compared with Roman classical law all other laws were unscientific.'
- 12 We have one of the letters Pringsheim wrote for Wieacker, dated 12 May 1947, for the use of the committees examining former Nazis. On Pringsheim's travel to Germany in the post-war period, see the letters in the Bodleian Library, Oxford, Archives of the Society for the Protection of Science and Learning, MS. SPSL. 272.1, 233 on his schedule; 190, Pringsheim to Ursell (3 April 1946), on his intent to go to Freiburg and need of a certificate of identity from the HO and a return visa; 272.1, 191 Skemp to Under Secretary of State (5 April 1946), application for travelling papers for Pringsheim, who is willing to assist in the educational reconstruction of Germany, short-term, children remain in Great Britain. Letters 192–206 about the arrangements for travel to Germany show how difficult movement was at the time.
- 13 Humboldt-Universität zu Berlin, Universitätsarchiv zu Berlin, UK Personalia Sch 303, Personal-Akten des Prof Dr Schulz, Band 2, letters nos. 86, 88–91; The correspondence around Schulz's move to Britain and his funding are at the SPSL archives (Bodleian Library, Oxford, Archives of the Society for the Protection of Science and Learning, MS. SPSL. 274.2). The collection consists of 183 pages between 1933 and 1948 about the conditions of his move, the potential locations and the funding available. Ernst 2004: 126–30; Breunung and Walther 2012: 432–59.
- 14 The index was the crowning achievement of the interpolationist movement, but its origins are in the works of Gradenwitz and Lenel. One of Schulz's main contributions was his article 'Überlieferungsgeschichte der Responsa des Cervidius Scaevola' (Schulz 1931).
- 15 On Daube's career, see also Rodger 2001 (his *Nachruf* in the *Savigny Zeitschrift*).
- 16 Carmichael 2004: 55–6, 69–71. He reproduces Lenel's letter from 7 July 1933.
- 17 The facts of Daube's early life are from his own recollections collected by Rodger 2004 and Carmichael 2004: 11–28, and thus to be taken with a grain of salt.
- 18 In fact, one of his best friends from high school would join the Nazis. Carmichael 2004: 22, 63.
- 19 Carmichael 2004: 63–5; Rodger 2004: 234 only glosses over this episode.

## References

- Arendt, H. (1951), *The Origins of Totalitarianism*, New York: Henry Holt.
- Ash, M. G. and Söllner, A., eds. (1996), *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933*, Cambridge and New York: Cambridge University Press.
- Balakrishnan, G. (2000), *The Enemy: An Intellectual Portrait of Carl Schmitt*, London: Verso.
- Breunung, L. and Walther, M. (2012), *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933. Ein bio-bibliographisches Handbuch*, vol. 1, Göttingen: De Gruyter.
- Breunung, L. and Walther, M. (forthcoming), *Die Emigration deutscher Rechtswissenschaftler ab 1933*, vol. 2, Göttingen: De Gruyter.
- Carmichael, C. (2004), *Ideas and the Man: Remembering David Daube*, Frankfurt: Vittorio Klostermann Verlag.
- Cumin, D. (2005), *Carl Schmitt*, Paris: Cerf.

- Daube, D. (1965), *Collaboration with Tyranny in Rabbinic Law*, Oxford: Oxford University Press.
- Daube, D. (1987), *Appeasement or Resistance and Other Essays on New Testament Judaism*, Berkeley, Los Angeles, London: University of California Press.
- Edgcomb, G. S. (1993), *From Swastika to Jim Crow: Refugee Scholars in Black Colleges*, Malabar: Krieger.
- Ernst, W. (2004), 'Fritz Schulz (1879–1957)', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted*, 105–203, Oxford: Oxford University Press.
- Fermi, L. (1968), *Illustrious Immigrants: The Intellectual Migration from Europe 1930–1941*, Chicago: University of Chicago Press.
- Finkenauer, T. and Herrmann, A. (2017), 'Die Romanistische Abteilung der Savigny-Zeitschrift im Nationalsozialismus', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 134: 1–48.
- Graham, K. (2002), 'The Refugee Jurist and American Law Schools, 1933–1941', *American Journal of Comparative Law*, 50: 777–818.
- Honoré, T. (2004), 'Fritz Pringsheim (1882–1967)', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted*, 205–32, Oxford: Oxford University Press.
- Ibbetson, D. (2004), 'Hermann Kantorowicz (1877–1940) and Walter Ullman (1910–1983)', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted*, 269–98, Oxford: Oxford University Press.
- Koenen, A. (1995), *Der Fall Carl Schmitt*, Darmstadt: Wissenschaftliche Buchhandlung.
- Koontz, C. (2003), *The Nazi Conscience*, London and Cambridge, MA: The Belknap Press.
- Lepsius, O. (2003), 'The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?', in C. Joerges and N. S. Ghaleigh (eds), *Darker Legacies of Law in Europe*, 19–41, Oxford and Portland, OR: Hart Publishing.
- Lutter, M., Stiefel, E. C. and Hoeflich, M. H., eds. (1993), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, Tübingen: Mohr Siebeck.
- Mehring, R. (2009), *Carl Schmitt: Aufstieg und Fall*, München: Beck.
- Neumann, F. (1944), *Behemoth: The Structure and Practice of National Socialism 1933–1944*, New York: Harper & Row.
- Pringsheim, F. (1930, repr. 1961), 'Aequitas und bona fides', in *Gesammelte Abhandlungen* 1, 154–72, Heidelberg: Carl Winter & Universitätsverlag.
- Pringsheim, F. (1934), 'The Legal Policy and Reforms of Hadrian', *Journal of Roman Studies*, 24: 141–53.
- Pringsheim, F. (1944), 'The Unique Character of Classical Roman Law', *Journal of Roman Studies*, 34: 60–4.
- Pringsheim, F. (1950), *The Greek Law of Sale*, Weimar: Böhlau.
- Pringsheim, F. (1960), 'Die Haltung der Freiburger Studenten in den Jahren 1933–1935', *Die Sammlung*, 15: 532–8.
- Riccobono, S. (1925–1926), 'Outlines of the Evolution of Roman Law', *University of Pennsylvania Law Review*, 74: 1–19.
- Rodger, A. (2001), 'David Daube (8.2.1909–24.2.1999)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 118: XIV–LII.
- Rodger, A. (2004), 'David Daube (1909–1999)', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted*, 233–48, Oxford: Oxford University Press.
- Rösch, F. (2014), *Émigré Scholars and the Genesis of International Relations. A European Discipline in America?*, Basingstoke: Palgrave Macmillan.
- Schönbauer, E. (1939), 'Zur "Krise des römischen Rechts"', in *Festschrift Paul Koschaker II*, 390–1, Weimar: Böhlau.

- Schulz, F. (1931), 'Überlieferungsgeschichte der Responsa des Cervidius Scaevola', in *Symbolae friburgenses in honorem Ottonis Lenel*, 143, Leipzig: B. Tauchnitz.
- Schulz, F. (1934), *Prinzipien des römischen Rechts*, Berlin: Duncker & Humblot.
- Schulz, F. (1946), *History of Roman Legal Science*, Oxford: Clarendon Press.
- Schulz, F. (1951), *Classical Roman Law*, Oxford: Clarendon Press.
- Stolleis, M. (1998), *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, Chicago: University of Chicago Press.
- Urbanik, J. (2016), 'Husband and Wife', in P. J. du Plessis, C. Ando, and K. Tuori (eds), *The Oxford Handbook of Roman Law and Society*, 473–86, Oxford: Oxford University Press.

